United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-6122

To be argued by
J. CHRISTOPHER JENSEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6122

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COUNTY OF SUFFOLK, COUNTY OF NASSAU, TOWN OF ISLIP, TOWN OF HEMPSTEAD, TOWN OF NORTH HEMPSTEAD, TOWN OF OYSTER BAY, TOWN OF HUNTINGTON, and the BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON AND CONCERNED CITIZENS OF MONTAUK, INC.,

Appellees,

—against—

SECRETARY OF THE INTERIOR, et al.,

Appellants,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al. and NEW YORK GAS GROUP,

Intervenor-Appellants.

P/S

THE STATE OF NEW YORK and THE NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Appellees,

—against—

THOMAS S. KLEPPE, Secretary of the Interior,

Appellant,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al. and NEW YORK GAS GROUP,

Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF FEDERAL APPELLANTS

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BRIEF OF FEDERAL APPELLANTS

Preliminary Statement

This is an appeal from an interlocutory order of the United States District Court for the Eastern District

of New York (Weinstein, J.) preliminarily enjoining the Secretary of the United States Department of the Interior and his lawful delegates ("federal appellants") from holding an outer continental shelf ("OCS") oil and gas lease sale for the Mid-Atlantic ocean (Sale No. 40).[1] The District Court, in a memorandum opinion and order dated August 13, 1976, (10a-89a)[2] granted appellees a preliminary injunction against holding the proposed oil and gas lease sale on the grounds that the federal appellants failed to comply with the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, in one respect—by inadequately considering the effect of coastal states' land-use controls upon the probable environmental impacts of the proposed oil and gas exploration and development.

Appellants filed notices of appeal with the Court on August 13, 1976, and sought an immediate hearing on their motions to stay the District Court's order. After hearing argument, (210a-211a) a panel of this Court by order dated August 16, 1976, stayed the enforcement of the District Court's preliminary injunction on the grounds that the appellees had failed to establish that they would be irreparably harmed by the OCS oil and gas lease sale and that the national interest in attaining energy independence would be damaged if the sale were aborted (210a).

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[1] The District Court's order was granted in two actions, *County of Suffolk, et al.* v. *Secretary of the Interior, et al.*, U.S.D.C. E.D.N.Y., Civil Action No. 75 C 208 and *The State of New York, et ano.* v. *Thomas S. Kleppe, et al.*, U.S.D.C., E.D.N.Y., Civil Action No. 76 C 1229. These two actions were consolidated by the District Court for purposes of pre-trial discovery and the motions for a preliminary injunction at a pre-trial conference held on June 30, 1976.

[2] All references are to the joint appendix except references to the Sale 40 Environment Impact Statement filed with this Court which are clearly designated as such.

Appellees then applied to Mr. Justice Thurgood Marshall of the United States Supreme Court on August 17, 1976, for an order vacating the stay of this Court and reinstating the District Court's preliminary injunction. Justice Marshall refused to grant appellees' application in his opinion of August 19, 1976, (212a-218a) and the Mid-Atlantic OCS oil and gas lease was held, as scheduled, on August 17, 1976.

Appellants, including the intervenors National Ocean-Industries Association, Inc. ("NOIA") and the New York Gas Group ("NYGAS"), now proceed with their appeal from that part of the opinion and order of the District Court that found the federal appellants to have violated the requirements of NEPA.

Issue Presented for Review

Whether the District Court abused its discretion by determining that the federal appellants failed to adequately consider the effect of coastal state land use control upon the probable environmental impacts of the outer continental shelf lease Sale 40.

Statement of the Case

The appellees in the action of *County of Suffolk et al.* v. *Department of Interior, et al.*, Civil Action No. 75 C 208 ("County Suit")[3] filed a complaint in the District Court on February 11, 1975, seeking to enjoin the federal appellants from proceeding with any accelerated

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[3] Appellees in this action are Nassau and Suffolk Counties and several Long Island towns and villages. One private environmental group, Concerned Citizens of Montauk, was subsequently allowed to intervene as a party plaintiff-appellee.

oil and gas leasing program on the outer continental shelf ("OCS") of the United States until the completion, and circulation for comments, of an environmental impact statement prepared pursuant to §102(2) (C) of the National Envioronmental Policy Act, 42 U.S.C. § 4332 (2) (C).

Appellees in the County suit also sought a permanent injunction against the entire OCS program because they disagreed with the substance of any decision to allow oil exploration and development in the federal OCS lands.

The federal appellants moved to dismiss that complaint on several grounds including sovereign immunity, lack of a ripe controversy, and the complaint's failure to state a claim upon which relief could be granted. After a hearing before the District Court on October 14, 1975, the federal appellants' motion was denied except to the extent that the Department of the Interior was dismissed as a party defendant *eo nomine*. At the same time, the District Court denied the County appellees' cross-motion for a preliminary injunction and for the convening of a three-judge court.

Throughout this period, the federal appellants were involved in preparing a site specific draft environmental impact statement (" EIS") on the proposed OCS lease Sale No. 40 in the Mid-Atlantic Ocean. Hearings on the draft EIS for Sale No. 40 were held in Atlantic City, New Jersey, in January, 1976 (40 EIS, Vol. III, p. 10). Prior to these hearings being held, the County appellees sought an order of the District Court directing that a document described as a Program Decision Option Document, dated September 1975 that had been previously prepared by the federal appellants in connection with the decision to accelerate OCS oil and gas lease sales nationwide be circulated for comment at the Atlantic

City hearings. The District Court refused to delay these hearings but directed the federal appellants to make the September, 1975 PDOD publicly available and to allow one day for testimony on this document at the hearings.

The final EIS on Sale No. 40 was filed on May 26, 1976, and on June 30, 1976, the Secretary of the Interior, after consideration of the final EIS and other materials, decided to authorize the Mid-Atlantic oil and gas lease Sale No. 40 to proceed on August 17, 1976.

On June 29, 1976, the State of New York and the National Resources Defense Council, Inc. ("NRDC") filed a complaint against the Secretary of the Interior (Civil Action No. 76 C 1229) also seeking injunctive relief against Sale No. 40 and against the national OCS accelerated leasing program for the Secretary-appellee's failure to comply with NEPA and various other environmental statutes. Extensive pre-trial discovery of appellants occurred in July and on July 23, 1976, the evidentiary hearing on the preliminary injunction began and continued until August 6, 1976. This eleven day hearing generated 2,645 transcript pages of expert testimony and 180 exhibits covering virtually every aspect of the adequacy of the environmental impact statements published by the federal appellees on the programmatic decision to accelerate OCS oil and gas leasing and on the lease Sale No. 40 for the Mid-Atlantic. Counsel for the parties argued the motions for a preliminary injunction on August 11, 1976, and the District Court issued its decision on August 17, 1976.

The Facts Relevant to the Issue Presented for Review

This appeal involves the question of whether the federal appellants complied with NEPA before the Secretary-appellant decided on June 30, 1976, to hold an OCS oil and gas lease sale for designated tracts in the Mid-

Atlantic ocean off the coast of southern New Jersey and Delaware.[4]

The events leading to the decision to hold lease Sale No. 40 commenced in January, 1974, when President Nixon announced several executive directives designed to deal with the energy crisis generated by the Arab oil embargo by aiding the United States to attain the goal of energy self-sufficiency. One of these directives, addressed to the Department of the Interior, called for the acceleration of leasing of OCS lands for the exploration and possible development of oil and gas in OCS areas as a means of increasing the domestic energy supply.

In accordance with this directive, the government announced in May, 1974, that it was commencing the preparation of a draft EIS on the possible acceleration of OCS leasing. The original OCS accelerated leasing proposal was for the leasing of 10 million acres in the OCS areas in 1975. A draft EIS was prepared, meetings were held between federal officials, including President Ford, and governors of affected coastal states and public hearings were held in Alaska, California, and New Jersey.

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[4] Appellees also sought below to enjoin the entire OCS accelerated leasing program that was adopted by decision of the Secretary of Interior on September 29, 1975. The District Court categorically refused to enjoin the national program because of its view that each sale must be separately considered as it arises. The Court also noted that several other challenges to individual sales and to the national program had been rejected by other federal courts (88a). *Sierra Club* v. *Morton*, 510 F.2d 813 (5th Cir. 1975); *State of Alaska* v. *Kleppe*, — F. Supp. — (D.D.C. August 13, 1976); *Southern California Association of Governments* v. *Kleppe*, 8 E.R.C. 1922 (D.D.C. 1976); *People of California* v. *Morton*, 404 F. Supp 26 (C.D. Calif. 1975), *on appeal* 9th Cir. The appellees have not cross-appealed from the District Court's denial of a preliminary injunction against the OCS accelerated leasing program. Consequently, we shall limit this statement of facts to lease Sale No. 40 and to the issues treated in the District Court's opinion.

As a result of these activities, the 10 million acre leasing proposal was abandoned and a modified proposal scheduling six sales a year over the next few years was substituted. On July 11, 1975, a final EIS ("programmatic EIS") was published by the federal appellants and on September 29, 1975, the then Acting Secretary, Kent Frizzel, made the decision to adopt the accelerated OCS leasing program.

The accelerated OCS leasing program called for sales in several so-called "frontier" areas where no federal OCS leases had ever been issued before. These areas included the outer continental shelf off the Alaska coast, portions of the Southern California coast, and the Atlantic outer continental shelf.

The Mid-Atlantic Sale No. 40

Pursuant to its obligations under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.*, and regulations promulgated thereunder, the federal appellants (specifically the Bureau of Land Management [BLM] within the Department of the Interior) identified a broad potential oil and gas lease area in the Baltimore Canyon Trough. The Baltimore Canyon is located in the Mid-Atlantic ocean off the coasts of New Jersey, Delaware, and Maryland. BLM employees began collecting resource reports on this area in December, 1974, and on March 26, 1975, a call for nominations was issued.

The technical resource reports described any valuable resources contained within the general proposed lease area and the potential effect of lease operations upon the environment of that area. After a review of these resource reports and consultation with other agencies, BLM delineated an area for a call for nominations of approximately 6.5 million acres in the Baltimore Canyon. At the same time as industry was nominating areas it would

like to bid upon, interested parties, including state and local governments were given an opportunity to indicate areas which they felt should be withheld from leasing for environmental reasons (40 EIS, Vol. I, pp. 6-13).

The call for nominations in the Mid-Atlantic resulted in the nomination of 557 tracts covering approximately 3.2 million acres out of the 6.5 million originally designated by BLM. During this period, the Geological Survey and the Fish and Wildlife Service, both subagencies within Interior, were also analyzing information available to them about the oil and gas potential of the tracts and sensitive environmental features of the proposed area. These agencies prepared their own tentative tract selctions which were submitted to BLM to assist in the tentative tract selection process (*Id.*).

In addition, representatives from the States of New York, New Jersey, Delaware, Maryland and Virginia were present and participated in the formal tract selection meetings between BLM and the Geological Survey. As the result of this tract selection process, the number of tracts selected was reduced from the 557 tracts comprising 3.2 million acres which had been nominated by industry to 154 tracts comprising only 876,750 acres. Tracts were ultimately selected upon consideration of environmental protection and other resource uses, concerns expressed by the coastal states, and the oil and gas potential of the tracts. Considerations leading to the elimination of nominated tracts included elimination of: 1) tracts which the commercial fishing industry, with the concurrence of federal and state agencies determined to have high importance for fisheries; 2) tracts that interfered with navigation; 3) tracts that exhibited certain geologic hazards; and 4) tracts receiving negative nominations from the coastal states and other interested parties because of various environmental hazards (40 EIS, Vol. I, p. 13). These tract selections were announced by the federal appellants on August 20, 1975.

On December 10, 1975, the federal appellants announced that BLM had prepared a draft EIS for the oil and gas lease Sale No. 40 covering the 154 tracts selected in the Mid-Atlantic. Previously, in August and October, 1975, interested parties and representatives of the coastal states were given an opportunity to review the working draft of the Sale 40 EIS.

After releasing the draft EIS, the federal appellants solicited and received extensive written comments from federal and state agencies and various private groups. At the public hearings in Atlantic City on the draft EIS, 137 witnesses testified and an additional 185 written comments were received. The federal appellants reviewed these comments and revised the draft EIS in response to some of the comments. In addition, the most significant comments, including comments from New York State, New Jersey and NRDC, were included verbatim in Volume III of the final Sale No. 40 EIS (40 EIS, Vol. III, pp. 182-274, 383-434).

The final EIS and various other internal memoranda were given to the Secretary in June, 1976, for his review. A decision meeting was held among the Secretary and his staff (i.e. various Assistant Secretaries and the involved Bureau Directors) on June 28, 1976, at which the proposed sale was discussed and on June 30, 1976, the Secretary formally decided to proceed with the sale.

After this Court granted a stay of the District Court's preliminary injunction order and Justice Marshall refused to vacate the stay, the OCS oil and gas lease sale No. 40 was held on August 17, 1976 in New York City.

At the sale, 154 tracts were offered and the federal appellants received 410 bids on 101 of those tracts. The total amount of bids received was 3.5 billion dollars. The

federal appellants have accepted 93 of the high bids totalling 1.128 billion dollars and are currently in the process of signing the leases on those 93 tracts. The bid amounts represent cash bonuses paid to obtain the lease. In addition, pursuant to the Outer Continental Shelf Lands Act. 43 U.S.C. §§ 1334 *et seq.*, the lessees must pay a royalty of 16 2/3 percent, or for some tracts 33 1/3 percent, of the value of all oil and gas recovered from the leased tracts.

ARGUMENT

The District Court erred in its conclusion that the federal appellants violated NEPA by not adequately considering the environmental impact of coastal state land use controls upon OCS lease sale No. 40.

After an 11 day hearing on appellees' motions for a preliminary injunction, at which over 2,500 pages of expert testimony and 180 exhibits were introduced on a multitude of scientific, economic and social issues arising from the proposed Mid-Atlantic oil and gas lease sale, the District Court could find only one minor respect in which, in its view, the appellants had violated NEPA or any of the other related environmental statutes. The District Court rejected every single contention advanced by the plaintiffs concerning the adequacy of the EIS for Sale No. 40 and the Secretary's decision under NEPA, stating:

> The [EIS] . . . satisfactorily [met] both the spirit and the letter of NEPA requirements in all respects except one.
>
> * * * * *
>
> In short, the [NEPA] process worked well to insure that the possible consequences of this major action in opening areas off our most populated coasts to oil and gas production was fully debated, open

> to political veto, and considered in depth by the Secretary and his staff as well as other units of government. (40a-41a)

The one purported inadequacy found by the Court in its own review of the final Sale 40 EIS was not asserted by the appellees at the hearing or in the briefs and pleadings filed by the appellees below. This finding, simply stated, is that the Sale 40 EIS did not *adequately* discuss the possibility that coastal states might prohibit pipelines from crossing their shores or coastal waters and that tankers might be used to transport the oil ashore (65a-82a). We submit that this finding is unsupported by the record evidence and violates the "rule of reason"—the basic principle of judicial review under NEPA.

The legal standard to be applied to the EIS is set forth in Section 102(2)(C) of NEPA, 42 U.S.C. § 4332 (2)(C), which provides in pertinent part:

> (2) all agencies of the Federal Government shall
>
> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly effecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short term uses of man's environment and the main-

tenance and enhancement of long term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should be implemented.

The section also provides that the responsible federal official is to obtain the comments of other federal agencies which have jurisdiction by law or special expertise with respect to the environmental impacts involved. The impact statement, when completed, plus the comments and views of appropriate governmental agencies are to be made available to the President, his Council on Environmental Quality and the public.

The courts have consistently interpreted the requirements of this section as mandating judicial scrutiny of the impact statement by applying a "rule of reason." *NRDC* v. *Callaway*, 524 F.2d 79 (2d Cir. 1975); *NRDC, Inc.* v. *Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972); *Greene County Planning Board* v. *Federal Power Commission*, 490 F.2d 256, 258 (2d Cir. 1973).

As the Supreme Court stated, in its recent decision on the NEPA requirement of an environmental impact statement, an "appropriate allowance for the inexactness of all predictive ventures" must be allowed in assessing the adequacy of the EIS. *Kleppe* v. *Sierra Club*, — U.S. —, 44 U.S.L.W. 5104, 4107 n. 14 (June 22, 1976). This is simply another statement of the rule of reason approach that was explicitly articulated by Justice Marshall in denying appellees' application to vacate the stay of this Court in the instant appeal when he stated the requirements of NEPA are "tempered by a practical 'rule of reason'" (215a).

The District Court, in finding that the discussion of state land use control in the sale 40 EIS was not "adequate" or "meaningful", completely violated the "rule of reason" and abused its discretion by granting the preliminary injunction. As demonstrated below, the District Court applied an overly strict test in assessing the discussion of state-land use control contained in the Sale 40 EIS. The discussion in the EIS more than fulfills the obligation to prepare a statement in objective good faith that provides enough information to allow for an informed public and an informed decision-maker, *Chelsea Neighborhood Association* v. *United States Postal Service*, 516 F.2d 378, 389 (2d Cir. 1975).

The decision on the issue of state land use control is also fundamentally at odds with the District Court's decision on all of the other scientific and social claims actually raised by the appellees. The District Court found that:

> [O]n balance, an impartial reader of the EIS's is driven to the conclusion that, within the limit of reasonable researchers and writers, a studied effort was made to present a fairly grim picture of possible environmental difficulties.

One by one, the District Court discarded the appellees' challenges to the EIS because "the gross data available sufficiently apprised him [the Secretary] of the overall dangers, so that further refinements were not worth the delays required to make them" (28a).

Then, in an inexplicable reversal, the District Court, *sua sponte*, selected an issue which is extensively dis-

cussed in the EIS and determined that issue was not "meaningfully" discussed. Of all the conceivable issues arising from the Mid-Atlantic oil and gas lease sale, the issue of state land use control is the one least susceptible to prediction and analysis now. The issue is essentially a political issue that will depend upon the vagaries of local political pressures and local decision-making. It will likely be a contest between environmentalists and labor unions or local business groups as to whether the state or locality should accept OCS oil and gas pipelines and related industrial development. The District Court speculates from its review of the state environmental statutes that states will either refuse to accept pipelines or will severely restrict them. The results of such an obviously political contest cannot, at this point, be predicted.

The District Court was not presented with a shred of evidence in the record that the states would, or could politically, refuse onshore development. The Court's prediction also rests on an underlying assumption that the states will choose increased oil tankering over pipelines even though the pipelines are considered to be environmentally desirable. In addition, the states, in their comments on the EIS, and in testimony in the hearing below, have been clamoring to make the use of pipelines absolutely mandatory.

In short, the District Court on this single point engaged in exactly the kind of "crystal ball inquiry" that appellate courts have refused to require under NEPA. *NRDC, Inc.* v. *Morton, supra*, 458 F.2d at 837; *accord Citizens for Safe Power, Inc.* v. *NRC*, 524 F.2d 1291, 1257

n. 9 (D.C. Cir. 1975); *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); *Scientists' Institute for Public Information, Inc.* v. *AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

That the District Court's concern is over a minimal issue, is illustrated by the fact that the issue is hardly mentioned in the lengthy written comments of the affected coastal states on the Sale 40 EIS. Even the appellees, who presented hours of expert testimony criticizing the EIS from every conceivable scientific and social standpoint, did not consider this issue to be a significant failing of the EIS. The only one of appellees' expert witnesses who even tangentially addressed this problem was Dr. Mitchell, professor of urban planning, Rutgers University. Dr. Mitchell actually contradicted the findings of the District Court by testifying that in his experience:

> [t]he Federal Government can, under certain circumstances, have the ultimate responsibility, the ultimate control (430a).

It was government counsel who pressed Dr. Mitchell on cross-examination to admit that statements in the EIS, to the effect that states and localities had ultimate control of land-use decisions, were correct statements, which Dr. Mitchell refused to acknowledge (427a-431a). Dr. Mitchell's only criticism of the government's treatment of the pipeline problems was that the government should require pipelines without exception (392a-393a).

The only other evidence arguably related to this issue was the testimony of the local planning board director for Cape May County that he did not want to have oil facilities in his county because of its unique coastal recreational facilities, although this official admitted that sub-

stantial areas of vacant, developable and industrially-zoned land existed along the coast of the County (trial tr. 1588 f and g). The District Court, itself, implicitly recognized the insubstantiality of its own point when it suggested, at oral argument, that all the Secretary of Interior had to do was to state that:

> * * * he had considered all of these matters, all he has to say is "[I've considered it state control of onshore facilities] and I maintain my decision." (trial tr. 2795-2796).

Yet the sale 40 EIS unequivocally identifies and even quantifies the environmental consequences of a complete refusal to accept pipelines by the affected coastal states.

Ironically, the District Court, in its opinion, quoted from the section of the EIS where the possibility of tanker oil spills is discussed and where it is expressly stated that "if rights-of-way are denied in state waters, tankers may have to be used as a result of this proposed sale rather than pipelines." (71a). The Court characterized this latter statement as a "passing reference" that presumably, in the Court's view, would be insufficient to disclose the possibility of tanker transport to the public or to the decision-maker as a result of state refusal to accept pipelines. Yet the Court neglected to point out that, later in the same discussion, the EIS hypothesizes that all of the oil recovered from the Mid-Atlantic will be transported ashore by tankers because of the unavailability of pipelines and projects the estimated oil spillage from tankers over the thirty year life of the oil field (40 EIS, Vol. II, pp. 30-31).[5]

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[5] There are numerous other places in the sale No. 40 EIS where the effect of ultimate coastal state land use control and the environmental impact of such control upon Sale 40 and the oil and

[Footnote continued on following page]

The District Court attempted to rationalize the extensive, explicit discussion of state land use control in the Sale 40 EIS by stating that the "total discussion" in the EIS operates on the "assumption that the affected states would permit pipelines from the oil fields through their three miles of sea bed and onshore coastal zones (66a)"—an assumption that the Court apparently feels is unjustified in its own reading of the various state land use and environmental statutes set forth in the appendix to the District Court opinion.

We agree that there is an assumption, or more accurately a hope, in the EIS that pipelines will be used to transport the oil. This assumption is completely reasonable in view of the fact that the assumption is conditional upon state approval of pipeline right of ways. The assumption is based upon the fact that appellants are requiring pipelines in one of the lease stipulations for sale 40 which provides:

> If feasible pipeline rights-of-way can be determined and obtained and, if laying such pipelines is technically and economically feasible, no crude

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gas development in the Mid-Atlantic is discussed, including: Vol. I, pp. 15, 17, 39-49, 50-52, 58-61; Vol. II, pp. 10-11, 17, 20-21, 426-430, 434, 449, 450-451, 452-453, 455-457, 463-464, 476, 477, 485, 502-505, 509, 516-519, 584-590; Vol. III, pp. 11, 12, 18, 24, 25, 26, 27, 30-31, 32, 45, 61-63, 64.

The programmatic EIS for the accelerated leasing program is also replete with references to the problem of state and local control of nearshore and onshore facilities in relation to the environmental impact of increased OCS oil and gas activity. *See* Programmatic EIS, Vol. I, pp. 131-133, Vol. II, pp. 45-60. The programmatic EIS also specifically discusses the possibility of tankering and its effect on oil spill projections should pipelines not be allowed. Vol. I, pp. 60-63; Vol. II, pp. 45-60.

> oil production will be transported by surface vessel from offshore production sites to adjacent onshore facilities except in case of emergency. (Stipulation No. 4, 1091a)

The very lease stipulation that is the basis for the pipeline assumption disapproved by the District Court indicates at the outset that use of pipelines depends upon obtaining pipeline rights-of-way from the affected coastal states.

Any assumption regarding the use of pipelines contained in the sale of 40 EIS is made contingent upon ultimate state land use control. As stated in the sale 40 EIS:

> It is anticipated that all oil and gas produced as a result of this proposed sale will be transported to shore by pipeline (special stipulation, Section IV, E.), although a possibility exists that tankers might be used. (40 EIS, V. II p. 17).

Whenever such a statement appears in the sale 40 EIS, it is always immediately qualified to indicate that the ultimate responsibility for allowing pipelines or other onshire facilities [6] is vested in the states. Some examples of this recognition of the state authority to prohibit pipelines and cause the use of tankers are the statement at Volume I, p. 15 of the sale 40 EIS that:

> While proposed stipulations (Section IV. E.) seek to prevent transportation of oil by tanker to the extent possible, use of tankers for transportation cannot be absolutely ruled out at this time.

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[6] In addition to a discussion of pipelines, the EIS contains a full discussion of other onshore support facilities that might be generated by sale 40 and the impact of those facilities upon the onshore environment (40 EIS, Vol. II, pp. 216-353).

or the statement at Volume II, p. 20 that:

> If it should not be technically and/or economically feasible to bring production ashore by pipelines, tankers may have to be used.[1]
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> * * *
>
> [1] Factors which could hinder or prohibit the use of pipelines in this Mid-Atlantic area might include the following: . . . 3) receptivity of state and local jurisdictions along Mid-Atlantic coast [SIC] and environmental impact statements for pipelines proposed for construction through wetlands. Several states possess regulations, as part of their pollution prevention programs, that would require permits and appropriate environmental analysis if proposed pipelines were to cross any watercourse.

In view of these and similar statements in the EIS, we submit that it was unreasonable for the District Court to conclude that the EIS fails to apprise the decision-maker or the public of the possible effect of state land use control upon the use of pipelines in the Mid-Atlantic.

The Court sought to justify its view, in the face of these clear statements in the EIS, by implying that the panoply of state regulations are not analyzed in the Sale 40 EIS. (76a). This implication is unjustified because the sale 40 EIS contains an entire section on state regulations in Volume II at pp. 426-431. This section identifies, state-by-state, the extent to which Coastal Zone Management Plans under the federal Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.* are being implemented and a brief discussion of various permits required by the states for development in coastal or tidal wetland areas. For example, the District Court cited the unique Maryland statutes which directly regulate

transfer and storage of oil as well as oil spillage emergencies (76a) as an item not analyzed in the EIS. Yet this precise Maryland statutory scheme is described in the sale 40 EIS, Vol. II at p. 437 where it is stated:

> Within the region, only Maryland has a fully integrated program which goes beyond coordination of oil spill responses. Oil spill prevention mechanisms and programs are required in order to obtain necessary permits for oil handling facilities in Maryland. Evidence of fiscal responsibility is required for all vessels involved in the transfer of oil. In the event of a spill, state personnel monitor cleanup progress, advise and direct actions, and collect data for enforcement actions.

This entire area is purely speculative because even the states themselves cannot be certain of what actions they might take or what statutes they might invoke until oil is actually discovered in a specific track and a specific proposal for pipelines or other onshore facilities has been submitted to the states.

This uncertainty is borne out by the comments of the coastal states that are published verbatim in Volume II of the sale 40 EIS. New York in its comment, for example, states "If approval cannot be obtained from the states for pipelines, the impact of tankering must be considered more carefully (40 EIS, Vol. III, p. 224). New Jersey indicates only that they are "evaluating whether oil and gas pipelines crossing the Atlantic Coast beaches will pose unacceptable risks . . ." (40 EIS, Vol. III, p. 242) and the State of New Jersey simply asks that "efforts should be made to include the State's geological knowledge in the location process" of pipelines and pipeline corridors (40 EIS, Vol. III, p. 258). The State of Delaware actu-

ally complains in the EIS that pipelines are not being absolutely mandated (40 EIS, Vol. III, pp. 286-28).[7]

Although given ample opportunity to indicate their refusal to accept pipelines in either their written comments on the EIS or during their participation in the tentative tract selection process, the affected coastal states have not done so. They have not done so because it would be environmentally irrational and against their own self-interest to refuse to accept pipelines before it is determined if and where pipeline landfalls might exist.

The illogicalness of the District Court's decision is further emphasized in its speculation that, short of prohibiting pipelines, states might restrict their point of entry in a fashion that might affect the selection of tracts to be leased. In fact, (Dec. pp. 66) the states were allowed to participate in the tract selection process and some tracts were eliminated at their request because of environmental hazards to coastal areas. By ignoring the states' participation in the tract selection process, the District Court reaches the absurd conclusion that pipeline location might dictate selection of tracts other than those proposed in Sale 40. The Court overlooked the obvious fact that tracts were primarily selected, of necessity, by the possibility that oil and gas may be recovered from the tracts. There may be thousands of tracts more ideally situated for the location of pipelines but none of them display the slightest potential for oil and gas development.

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[7] This view was echoed by the State of New York at the hearing below which introduced expert testimony complaining that pipelines were not mandated rather than simply being required where "economically and technically feasible" (241a-243a).

It would be extraordinarily capricious for these same states now to refuse the pipelines and possibly engender the use of tankers as surmised by the District Court.

Perhaps the strongest evidence of the federal appellants' awareness of the problem of coordinating OCS activity with state and local jurisdictions is the elaborate regulatory framework established by the Department of Interior. This regulatory control over the OCS lessees specifically mandates that information concerning the proposed oil exploration and development activities be submitted to the coastal states in advance so that the states can anticipate and plan for onshore development.

The government's regulations,[8] OCS operating orders for the Mid-Atlantic,[9] and lease stipulations[10] for the Sale 40 leases all contain measures designed to provide coastal states with timely and detailed information about OCS exploration, deveolpment and production and to allow the coastal states an opportunity to comment upon the proposed activities before necessary permits are issued by the federal appellants.[11]

For example, the regulations provide that prior to commencing any exploratory drilling, the lessee must obtain approval of exploration plans, 30 C.F.R.250.34. Lease Stipulation No. 7 further requires, as a condition of approving the exploration plans, that a "Notice of Sup-

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[8] Particularly 30 C.F.R. 250.34 reprinted at 40 EIS, Vol. III, pp. 786-788, and discussed at 40 EIS, Vol. II, pp. 410, 418, 445, 449, 584-585.

[9] Particularly Operating Order No. 12. (41 Federal Register at 28564, 1095a), 40 EIS Vol. III, pp. 775-781 and proposed Operating Orders 9, 11, 15 (discussed at 40 EIS, Vol. II, pp. 389-390, 407-408, 410-411, 412, 413-415).

[10] Particularly Stipulation No. 7 (1092a), 41 Federal Register at 29439.

[11] The coastal states themselves also have an extensive statutory permit procedure for nearshore and onshore activities that is set forth in the appendix to the District Court's opinion, and is summarized in the sale 40 EIS (Vol. I, pp. 39-61, Vol. II, pp. 426-430).

port Activity for the Exploration Program" be prepared and given to the Mid-Atlantic coastal states. This notice must inform the states of such things as a description of all onshore and nearshore support facilities anticipated to be used during exploration, the amount of acreage expected to be required for the onshore facilities, and the approximate numbers of persons expected to be employed in the onshore support activities. The states then have an opportunity to comment upon the proposed exploration activity as it might affect them prior to any exploration plans being approved.[12]

The District Court's speculation that there was "apparently no real awareness of the fact that state laws may severely restrict pipelines and related on-shore facilities" (73a) simply cannot be sustained in the face of the extensive efforts by federal appellants to insure cooperation between the OCS lessees and the coastal states. Obviously, these procedures are born out of an acute awareness by Federal appellants of the crucial role played by the coastal states in controlling the use of pipelines and related onshore facilities.[13]

We submit that the District Court's decision contains an erroneous interpretation of NEPA and that the attendant preliminary relief granted constituted an abuse of the Court's discretion. Moreover, appellate review of

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[12] A similar system is established for the approval of development plans, 30 C.F.R. 250.34(b) and proposed OCS Operating Order No. 15, 40 EIS, Vol. II, p. 410.

[13] The federal appellants' sensitivity and concern for state control of land use and pipeline corridors is further evidenced by the extensive procedures established to insure Bureau of Land Management and Geological Survey responsibility in conducting pipeline studies which involve examination of physical environmental factors and state land use policies (40 EIS, Vol. III, pp. 30-1 and pp. 522-529).

preliminary injunctions granted under NEPA, as has been held by the Court of Appeals for the District Court Circuit in *NRDC* v. *Morton, supra* at p. 832, "may well come to depend on an assumption of underlying legal premise." Thus, it is submitted that a reversal of the erroneous order of the District Court is mandated.[14]

After having concluded that the sale 40 EIS and the programmatic EIS satisfied "the spirit and the letter of NEPA", the District Court clearly erred in granting preliminary relief on the basis of an alleged "quantitative" defect in a minor aspect of the Sale 40 EIS. No matter how appealing this issue may have been for the District Court, it was improper to have enjoined this important federal action because of some unsubstantiated speculation about the conduct of the coastal states. It was especially improper in view of the regulatory scheme designed by the federal appellants to mitigate any conflicts with coastal state control over pipelines and related onshore facilities.

The ultimate reason for reversing the District Court, however, is rather a simple one. The issue which the District Court found not to be "meaningfully" discussed in the sale 40 EIS is discussed as comprehensively as required by the most stringent application of the "rule of reason" under NEPA.

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[14] This Court has already determined that the appellees fail to establish any irreparable injury which is a necessary prerequisite for the District Court's order. The decision of that three judge panel is the decision of this Court and generally may be reversed only by the Court sitting *en banc*, or of course, by the Supreme Court. *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 255-262 n.13 and 20 (1953); *United States* v. *Lewis* 475 F.2d 571, 574 (6th Cir. 1973).

CONCLUSION

It is respectfully submitted that the decision and order of the District Court granting a preliminary injunction under NEPA should be reversed and that the action be remanded for trial on the merits.

Respectfully submitted,

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* The United States Attorney's office wishes to acknowledge the invaluable assistance of Marilyn Go in the preparation of this brief. Ms. Go is a third year law student at Harvard Law School.

Docket No. - 76-6122

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COUNTY OF SUFFOLK, COUNTY OF NASSAU, TOWN OF ISLIP, TOWN OF HEMPSTEAD, TOWN OF NORTH HEMPSTEAD, TOWN OF OYSTER BAY, TOWN OF HUNTINGTON and the BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON and CONCERNED CITIZENS OF MONTAUK, INC.,

Appellees,

-against-

SECRETARY OF THE INTERIOR, et al.,

Appellants,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al., and NEW YORK GAS GROUP,

Intervenor-Appellants

Docket No. 76-6122

THE STATE OF NEW YORK and THE NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Appellees,

-against-

THOMAS S. KLEPPE, Secretary of the Interior,

Appellant,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al., and NEW YORK GAS GROUP,

Intervenor-Appellants.

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Sworn to before me this
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Evelyn Sommer

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Sally Reese

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